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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,
Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on State-owned land, and that occur in connection with activities that are compelled or encouraged by State and Federal law or policy.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The National Farmers Union Insurance Companies ("National") and Lodge Grass School District No. 27 ("School District") hereby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana is reported at 560 F. Supp. 213 (1983) and is reproduced in pages 14a-27a of Petitioners' Appendix ("Pet. App."). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 736 F.2d 1320 (1984) and is reproduced at Pet. App. 1a-13a.

JURISDICTION

The judgment of the Court of Appeals was entered July 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES, TREATIES AND OTHER LAWS INVOLVED

The issues in the present case concern principally the retained sovereign powers of dependent Indian Tribes which, as discussed below (pp. 9-10, *infra*), are a matter of federal common law. The District Court, after "[a] thorough search of the relevant literature," found no "congressional legislation or treaties delegating civil jurisdiction over non-Indians to the Crow Tribe." 560 F. Supp. at 216 (Pet. App. 20a).

STATEMENT OF THE CASE

A. The Tribal Court Default Judgment Against Petitioner School District

Petitioner Lodge Grass School District No. 27 is a governmental subdivision of the State of Montana and, *inter alia*, operates the Lodge Grass Elementary School within the Crow Indian Reservation. The property on which the school is located, however, is owned by the State of Montana. The School District is obligated by Federal and State law to provide education to Indian as well as non-Indian children residing on the Reservation. 560 F. Supp. at 215 n.2 (Pet. App. 19a).

On May 27, 1982, respondent Leroy Sage, an Indian student attending the Lodge Grass Elementary School, was injured on school premises by an uninsured third party. The injury consisted of a broken leg and allegedly involved about $3,000 in medical expenses. While the matter was being negotiated with and investigated by

petitioner National, the School District's insurer,[1] Leroy Sage and his guardian, respondent Flora Not Afraid, filed a negligence suit in the Tribal Court of the Crow Indian Reservation.

The summons and complaint in the Crow Tribal Court action were served on September 28, 1982 by Dexter Falls Down, a process server for the Tribal Court, on Wesley Falls Down, a member of the school board that administers the School District.

For unknown reasons, Wesley Falls Down neglected to notify any other school authority, or petitioner National, that the action had been filed. According to the District Court's findings, "[a] default judgment was taken on October 19, 1982, twenty-one days" later, granting $3,000 in medical expenses and $150,000 for "pain and suffering." 560 F. Supp. at 214 (Pet. App. 16a).

Wesley Falls Down served the default judgment on the principal of the Elementary School on or about October 27, 1982. Petitioner National first became aware of the Tribal Court action and default judgment on October 29, 1982 when it received a copy in the mail.

B. The District Court's Ruling That The Crow Tribal Court Exceeded Its Jurisdiction

Petitioners filed an action for injunctive relief in the District Court and, in a memorandum opinion dated Janu-

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[1] Petitioner National, a Utah corporation, had issued a comprehensive general liability policy to the School District. National has denied any liability to the School District with respect to the claim. Nonetheless, National is tendering a good faith defense in this matter pursuant to the insurance agreement.

ary 26, 1983,[2] U.S. District Judge James F. Battin upheld petitioners' contention that the Crow Tribal Court lacked subject matter jurisdiction over the tort claim.[3]

First, the District Court found federal jurisdiction under 28 U.S.C. § 1331 (1982). Emphasizing "the overriding federal interest in determining the extent of tribal sovereignty" and "[t]he necessity of a proper forum wherein the extent of tribal court jurisdiction can be determined," Judge Battin concluded that petitioners' action "places at issue the extent of tribal court civil jurisdiction over non-Indians as developed by the Supreme Court in *Montana* v. *United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)." 560 F. Supp. at 214-15 (Pet. App. 17a-18a).

Turning to the question of the Crow Tribal Court's jurisdiction over the tort claim, Judge Battin, following this Court's analysis in *Montana*, reasoned that such jurisdiction can exist only if (1) it "has been delegated to the Tribe" by statute or treaty, or (2) "the power has been retained by the Tribe as an element of inherent sovereignty even after the Tribal nation became a quasi-

[2] Because respondents Sage and Not Afraid threatened immediate execution of the judgment against school property, petitioners had earlier sought a temporary restraining order, which was granted November 3, 1982. Petitioners also alleged violations of their federal constitutional rights under the Fifth and Fourteenth Amendments and asserted that the procedures followed by the Tribal Court were contrary to the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1982) ("ICRA"). *See* note 4, *infra*.

[3] Petitioners were forced to move quickly in federal court because a writ of execution could have been issued by the Crow Tribal Court as early as November 4, 1982. Moreover, to seek relief from the Tribal Court might have been deemed a waiver of petitioners' objections to the putative personal and subject matter jurisdiction of the Indian tribunal.

sovereign within the exterior boundaries of the United States." 560 F. Supp. at 215-16 (Pet. App. 19a-20a).

Finding no express delegation by statute or treaty, the District Court examined the second test, applying the criteria of *Montana*, 450 U.S. at 565-66. Specifically, Judge Battin concluded that this is not a case involving the Crow Tribe's power to "regulate . . . the activities of non-members who [may] enter consensual relationships with the tribe or its members" (*Montana*, 450 U.S. at 565), stressing that "indeed, the School District is a subdivision of the sovereign government of the State of Montana." 560 F. Supp. at 215-16 (Pet. App. 19a-21a). Nor, according to Judge Battin, does this case involve the Tribe's power to exercise civil authority over "the conduct of non-Indians" that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare *of the Tribe*. *Montana*, at 566" (emphasis in original), because it involves only a "dispute between the school district and the injured schoolboy." 560 F. Supp. at 216 (Pet. App. 21a-22a).[4]

C. The Ninth Circuit's Decision That Petitioners Have No Federal Claim

Respondents appealed Judge Battin's decision and a divided panel of the Ninth Circuit reversed on July 3, 1984. Although respondents did not argue that petitioners lack a federal remedy,[5] the brief majority opinion

[4] Because the Court held "that the Tribal Court did not have jurisdiction over the tort claim," it declined to rule on petitioners' other challenges to the Tribal Court judgment (*see* note 2, *supra*), but specifically reserved them "for resolution at a later date." 560 F. Supp. at 215, n.1 (Pet. App. 18a). Petitioners intend to pursue these issues if appropriate after disposition by this Court.

[5] Respondents' briefs on appeal conceded the existence of a federal cause of action for abuse of tribal court jurisdiction, but argued that

holds that even if the Crow Tribal Court did not have jurisdiction over respondent Sage's tort claim, petitioners have no "claim for federal relief." 736 F.2d at 1323 (Pet. App. 7a).[6]

The basis of the majority's holding is difficult to decipher. First, it concludes that a Ninth Circuit decision in a separate action, *R. J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3846 (U.S. April 27, 1984) (No. 83-1811), "controls this case." 736 F.2d at 1322 (Pet. App. 5a). Nonetheless, as Judge Wright's dissenting opinion points out, the plaintiffs in *R. J. Williams* "did not allege general federal question jurisdiction under federal common law." 736 F.2d. at 1325 (Pet. App. 11a). *See R. J. Williams*, 719 F.2d at 981-83.

Apart from the exigencies of this case (*see* note 9, *infra*) and the fact that petitioners are not required to pursue futile remedies, the imposition of an exhaustion requirement now is plainly inappropriate considering the time and resources that have been invested in resolving this federal court action. *See, e.g., Teamsters Public Employees Union Local No. 594 v. City of West Point, Nebraska*, 338 F. Supp. 927 (D. Neb. 1972).

Second, the majority's analysis appears to be based on an expansive reading of this Court's decision in *Santa*

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petitioners must first exhaust tribal court remedies. *See* Brief of Appellants Leroy Sage and Flora Not Afraid at 4-6; Brief of Appellant Crow Tribe of Indians at 9-12.

[6] Circuit Judge Wright's separate opinion disagrees with this conclusion but concurs in the result because of petitioners' failure to submit themselves to the Crow Tribal Court's jurisdiction to exhaust whatever remedies are available there. 736 F.2d at 1324. (Pet. App. 8a). *See* note 3, *supra* and note 9, *infra*.

Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) as broadly confirming a "manifest" congressional purpose, supposedly embodied in the Indian Civil Rights Act, "to limit the intrusion of federal courts upon tribal adjudication." 736 F.2d at 1323 (Pet. App. 7a). As Judge Wright's dissenting opinion forcefully points out, however, and the majority grudgingly concedes, the federal courts including this Court have frequently recognized a federal right to relief for abuse of tribal power. 736 F.2d at 1323-1325 (Pet. App. 5a-7a, 8a-11a).

In the end, the Court of Appeals concedes that there "may" be "a federal cause of action" for "a tribe's abuse of *regulatory* jurisdiction," but that in cases (like this one) of "*adjudicatory* jurisdiction," there is no basis for federal court relief. 736 F.2d at 1323 (Pet. App. 6a-7a) (emphasis supplied). Whatever the meaning of this distinction,[7] its unmistakable consequence for petitioners is underscored by Judge Wright's separate opinion: it "makes the tribal court the first *and last* arbiter of its own jurisdiction." 736 F.2d at 1325 (emphasis in original) (Pet. App. 12a).[8]

Petitioners applied to this Court on August 22, 1984 for a stay of the mandate of the Court of Appeals after

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[7] As Judge Wright's dissent points out, many of the cases that apparently fall within the majority's definition of "regulatory jurisdiction" came to the federal courts from Indian tribal courts. 736 F.2d at 1324. (Pet. App. 9a). *See, e.g., Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied* 104 S.Ct. 1707 (1984); *Cardin* v. *De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied* 103 S. Ct. 293 (1982).

[8] Although the Court of Appeals maintains that petitioners could raise their jurisdictional challenge to the Tribal Court judgment in defense of collateral enforcement proceedings brought in the Montana courts, *see* 736 F.2d at 1324 n.5 (Pet. App. 7a), there is no prospect that respondents will follow that course.

unsuccessfully seeking relief below. Petitioners' stay application was granted by Associate Justice Rehnquist on August 23, 1984 "pending further order of the undersigned or of this Court."[9]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT AND FREQUENTLY RECURRING QUESTIONS CONCERNING THE ROLE OF THE FEDERAL COURTS IN REVIEWING INDIAN TRIBAL SOVEREIGNTY.

The decision of the Court of Appeals holds that, in a potentially large but ill-defined class of disputes, the federal courts are without power to protect non-Indians from abuse of tribal court jurisdiction. As detailed below, the Court of Appeals decision overlooks longstanding federal judicial practice and, in the absence of early guidance by this Court, is likely to produce considerable confusion if not chaos as Indian tribal courts continue to assert and expand jurisdictional claims over non-Indians.

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[9] Petitioners were forced to seek a stay because after the decision by the Court of Appeals, respondents Sage and Not Afraid continued to threaten to execute the Crow Tribal Court default judgment. *See* note 2, *supra*. In fact, school property was seized by Tribal Court officials and was scheduled for sale at public auction. *See* petitioners' Application for Immediate Stay of Execution of Mandate of the United States Court of Appeals for the Ninth Circuit and for Ancillary Relief, No. A-123, dated August 22, 1984.

Judge Wright's separate opinion in the case below relied on cases which are unrelated to the jurisdictional disputes at issue here. Moreover, Judge Wright made no attempt to apply the "flexible" exhaustion test of that line of cases to the exigencies presented in this case. *See also* note 6, *supra*.

A. The Court Of Appeals Decision Marks An Abrupt Departure From The Long History Of Federal Court Review Of The Complex Legal Relationships Between Tribal Governments, The State And Federal Governments, And Non-Indian Citizens.

Since early in the history of the Nation, the federal courts including this Court have labored at the task of reconciling the complicated inter-relationships between Indian Tribal Governments, the State and Federal Governments, and citizens—both Indians and non-Indians—that are affected by inter-governmental conflicts of jurisdiction. *See, e.g., Cherokee Nation* v. *Georgia*, 30 U.S. 1 (5 Pet. 1) (1831) (exploring the retained sovereignty of Indian tribes after submitting to the authority of the United States); *Ex parte Crow Dog*, 109 U.S. 556 (1883) (determination of criminal jurisdiction over crimes committed by one Indian against another is exclusive in the tribe absent federal law to the contrary). While Federal Indian law jurisprudence encompasses a wide variety of subjects such as taxation, business licensing and civil and criminal authority,[10] the principles announced in the decisions are derived primarily from a reasonably well-defined body of federal law, including especially treaties and federal statutes, as well as from principles of construction applied by federal courts. *See,*

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[10] *See, e.g., Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (relating to a state requirement that Indians collect state cigarette tax); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (addressing ability of Indian tribes to impose severance taxes on non-Indians); *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980) (business licensing); *Williams* v. *Lee*, 358 U.S. 217 (1959) (civil jurisdiction over Indian defendants is exclusive in tribal courts); *Draper* v. *U.S.*, 164 U.S. 240 (1896) (federal criminal jurisdiction over murder of a non-Indian by another non-Indian on a reservation).

e.g., *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

What has emerged is a substantial body of federal common law on the question of the powers and jurisdictional limitations of Indian tribal governments *vis-a-vis* other governments and citizens. In recent years, this Court and the lower federal courts have increasingly turned attention to the exercise by Indian tribal courts of jurisdiction over non-Indians. In *Oliphant*, for example, this Court held that Indian tribal courts lack criminal jurisdiction over non-members of the Tribe. 435 U.S. at 211-12. The complementary case concerning civil jurisdiction, *Montana*, extended the *Oliphant* rule against tribal court authority over non-Indians except in two specific kinds of circumstances: (1) the regulation of non-members who enter consensual relationships with the Tribe, and (2) protection of the political integrity, economic security, or health or welfare of the Tribe. 450 U.S. 564-66. *See* p. 5, *supra*.

Prior to the Court of Appeals decision below, the lower federal courts were in the process of applying the *Montana* criteria, and other federal common law principles of Indian tribal sovereignity, to a broad and growing array of disputes involving claims of abuse of tribal jurisdiction. *See* pp. 11-13, *infra*. The Ninth Circuit's sudden proclamation of a sharply reduced role for the federal courts in resolving tribal court jurisdiction not only goes a long way toward writing *Montana* off the books, but also is likely to create considerable confusion in a wide variety of legal and commercial contexts, as we show in the next section.

B. The Need For Early Guidance By This Court Is Underlined By The Extensive Interface Between Indian And Non-Indian Interests As Well As The Steadily Broadening Jurisdictional Assertions Of Indian Tribal Courts.

Like the Port Madison Reservation discussed in *Oliphant*, Indian reservations are typically "checkerboard[s]" of "tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained" by county, state and federal governments, as well as "public schools, public utilities and other facilities in which" the tribes have "no ownership or interest." 435 U.S. at 193 & n.1. In addition, a substantial portion of the individuals residing on many reservations are non-Indians.[11] As this Court has observed, much of the "checkerboard" character of Indian reservations—including specifically the Crow Indian Reservation at issue in this case—is the product of previous Federal policies which were not intended to subject non-Indian inhabitants to tribal regulatory authority. *Montana*, 450 U.S. at 559-60 & n.9.

The obvious potential for recurrent disputes over Indian tribal court jurisdiction over non-Indians is amplified by the relatively recent efforts of Tribal Governments to establish tribal courts and to aggressively extend their jurisdiction to non-Indians.[12] Over one hundred tribal

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[11] In the case of the Port Madison Reservation discussed in *Oliphant*, for example, only 50 of about 3,000 inhabitants are members of the Tribe. *Id. See also Mescalero Apache Tribe* v. *New Mexico*, 677 F.2d 55, 57 n.1 (10th Cir. 1982), *aff'd*, 103 S. Ct. 2378 (1983) (contrasting the Mescalero Apache Reservation, where less than 200 acres out of a total of 460,000 are owned by non-Indians, with the Crow Reservation at issue in this case, where 28 percent of the land within the reservation is owned by non-Indians).

[12] Historically, non-Indians have not been subject to civil or criminal suits in Indian courts. *See* F. Cohen, *Handbook of Federal Indian Law*, 355 (1982) ("[i]n the past tribes have not authorized their courts

courts now exist throughout the country,[13] and these tribal courts are increasingly asserting jurisdiction over non-Indian inhabitants on reservations. As already mentioned, these interests include school districts, housing authorities, other governmental services, and public utilities, as well as private individuals and businesses.

The character and magnitude of the potential impact of the Ninth Circuit's decision is perhaps best illustrated by the kinds of cases in which federal courts have, at least heretofore, entertained challenges to Indian tribal court assertions of jurisdiction over non-Indians. These cases include: (1) tort actions seeking recovery of compensatory and punitive damages for spills of uranium mill tailings, *UNC Resources, Inc.* v. *Benally*, 514 F. Supp. 358 (D.N.M. 1981) (suits in Navajo Tribal Court amounting to $30 million—injunctive relief granted), *UNC Resources, Inc.* v. *Benally*, 518 F. Supp. 1046 (D. Ariz. 1981) (companion to previous case—injunctive relief granted); (2) a civil damages action for violation of tribal regulations prescribing procedures for repossession of Indian personal property, *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1707 (1984) (affirming district court's denial of injunctive relief); (3) a tort action against non-Indians for an auto accident on a U.S. highway within the boundaries of the Navajo Reservation, *Swift Transportation, Inc.* v. *John*, 546 F. Supp. 1185 (D. Ariz. 1982), *vacated as moot*, 574 F. Supp. 710 (1983) (injunctive relief granted); (4) an injunc-

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to entertain civil cases against non-Indian defendants. The only forum available for most actions arising in Indian country by Indians against non-Indians has been a state court, and state decisions have sustained this jurisdiction." [citations omitted]); *Oliphant*, *supra* at 195-206 (1978).

[13] *Santa Clara Pueblo*, 436 U.S. at 65 n.21.

tive action against non-Indians operating a store on the Quinault Indian Reservation in violation of tribal health regulations, *Cardin* v. *De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 103 S. Ct. 293 (1982) (reversing district court's grant of injunctive relief).

Indeed, the potential legal and commercial ramifications of the Ninth Circuit decision are already being felt. For example, attorneys from both the Montana Office of Public Education and the Montana Attorney General's Office have expressed serious concern about the impact of the Ninth Circuit's decision on the 47 Montana school districts located on Indian reservations, and have indicated an interest in participating in any review proceedings in this Court.[14] Similarly, a Montana public utility district serving the Blackfoot Reservation is threatened with bankruptcy because the Blackfoot Tribal Court has enjoined the district from terminating utility service on the reservation for nonpayment of bills. A federal district court proceeding to review the jurisdiction of the Blackfoot Tribal Court ruling was summarily dismissed in the wake of the Ninth Circuit decision below. *East Glacier County Water & Sewer District* v. *Blackfeet Tribal Court*, Cause No. CV 84-33-GF (D. Mont., Great Falls Div.).

It is readily apparent that the principle set down by the Court of Appeals could have a profound impact on existing legal and commercial relationships between reservation inhabitants and a wide variety of institutions, including public schools, utilities, municipalities, and other public or quasi-public bodies supplying services to Indians and non-Indians alike. Accordingly, this Court should

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[14] *See* Petitioners' Stay Application, note 9, *supra*, at Attachment C.

accept review to clarify the extent to which Indian tribal courts are the sole arbiters of their own jurisdiction.

II. THE COURT OF APPEALS MISREADS THIS COURT'S LIMITED DECISION IN *SANTA CLARA PUEBLO* AS ANNOUNCING SWEEPING NEW RESTRICTIONS ON THE TRADITIONAL ROLE OF THE FEDERAL COURTS IN REVIEWING ASSERTIONS OF TRIBAL AUTHORITY.

Apart from the important and recurring character of the issues presented, this case deserves Supreme Court review because the decision of the Court of Appeals below seriously misinterprets this Court's decision in *Santa Clara Pueblo*.

As already observed, the majority opinion below appears to find in *Santa Clara Pueblo* the foundation for a broad new limitation on the role of the federal courts in protecting non-Indians from abuses of tribal court jurisdiction. But *Santa Clara Pueblo* involved an *intra-tribal* political dispute and, as Mr. Justice Marshall's opinion for the Court makes clear, addressed *only* the question of whether the Indian Civil Rights Act "may be interpreted to impliedly authorize" federal civil actions to enforce the Act's "substantive provisions." 436 U.S. at 51-52. In deciding that no such implied federal cause of action to enforce the ICRA exists, the Court's analysis focused on the purposes and legislative history of the ICRA. *Id.* at 60-72.

In other words, there is no implication in *Santa Clara Pueblo*—much less a comprehensive analysis—that supports withdrawing or limiting federal common law remedies for abuse of jurisdiction by Indian tribal courts. Nonetheless, in light of the potential impact of the Ninth Circuit decision, this Court should accept review to clarify the limited scope of *Santa Clara Pueblo*.

CONCLUSION

This case presents important questions concerning the role of the federal courts in enforcing what this Court has called the Federal Government's "great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty." *Oliphant*, 435 U.S. at 210. The confined role envisioned by the Court of Appeals is inconsistent with a substantial body of federal common law, misreads this Court's decision in *Santa Clara Pueblo*, and may have a broad impact especially in the West.

Accordingly, this Court should grant petitioners' request for a writ of certiorari to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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August 29, 1984

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 83-3606, 83-3645

NATIONAL FARMERS UNION INSURANCE COMPANIES, a Utah corporation, and Lodge Grass School District No. 27,
Plaintiffs-Apellees,

v.

CROW TRIBE OF INDIANS, *et al.*,
Defendants-Appellants.

Argued and Submitted Dec. 6, 1983,
Decided July 3, 1984

School district and its insurer sought preliminary injunction preventing injured schoolboy from executing on default judgment taken in Indian tribal court against school district. The United States District Court for the District of Montana, James F. Battin, Chief Judge, 560 F.Supp. 213, held that tribal court lacked jurisdiction over the tort claim, that Montana state court had jurisdiction over the controversy, and that school district and its insurer were entitled to the injunctive relief requested. Tribal defendants appealed. The Court of Appeals, Fletcher, Circuit Judge, held that insurer's complaint challenging tribal court's assertion of jurisdiction over insured school district in civil suit brought by injured Indian schoolboy stated no claim for relief under federal common law; tribal court itself was proper forum for

determination, at least in the first instance, of extent of tribal court's jurisdiction.

Reversed.

Eugene A. Wright, Circuit Judge, dissented in part, concurred in result, and filed opinion.

Rodney T. Hartman, Herndon, Harper & Munro, Billings Mont., for plaintiffs-appellees.

Scott McElroy, Thomas R. Acevedo, Fredericks & Pelcyger, Boulder, Colo., for Crow Tribe.

Clarence T. Belue, Hardin, Mont., for Sage and Not Afraid.

Appeal from the United States District Court for the District of Montana.

Before WRIGHT, ANDERSON and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

In May of 1982, Leroy Sage, a minor, and an enrolled member of the Crow Indian Tribe, was struck by a motorcycle while in the parking lot of Lodge Grass School District No. 27. The School District is located on land owned by the State of Montana and within the exterior boundaries of the Crow Indian Reservation. Sage and his guardian, Flora Not Afraid, filed a negligence suit against the school district in Crow Tribal Court. Tribal process was served on the chairman of the school board, but the school district failed to answer Sage's complaint or to appear in tribal court to contest its jurisdiction. Sage ultimately obtained a default judgment against the school district. Upon receiving notice of the default judgment, the school district notified its insurer, National Farmers Union Insurance (National), of the tribal suit. Neither the

school district nor National contested the default judgment in Crow Tribal Court, *see* Crow Tribal R.Civ. Proc. 17, or sought an appeal to the Crow Tribal Court of Appeals, *see* Crow Tribal Code § 31-1-103; Crow Tribal R. App.Proc. 2. Instead, National obtained a temporary restraining order from a federal district court prohibiting Sage from enforcing his default judgment, and filed suit against the Crow Tribe, the Crow Tribal Council, the Crow Tribal Court, tribal judges and the chairman of the tribal council, seeking a permanent injunction.[1] On December 29, 1982, the district court entered a permanent injunction prohibiting Sage, Not Afraid, their counsel, the tribal judges and the chairman of the tribal council from executing on any judgment or pressing any claim against National or the school district arising from Sage's injury. We reverse.

The district court held that it had jurisdiction over the suit under 28 U.S.C. § 1331 (1976),[2] and ruled that National's claim arose under federal common law. *See National Farmers Union Insurance v. Crow-Tribe of Indians*, 560 F.Supp. 213, 214-15 (D.Mont.1983). National's complaint alleged that the tribal court violated the federal constitution and the Indian Civil Rights Act, 25 U.S.C. §§ 1301-41 (1976) (ICRA), by asserting jurisdiction over the school district. The district court declined to decide whether allegations of deprivation of constitutional rights or violations of the Indian Civil Rights Act stated a claim for federal relief. *See* 560 F.Supp. at 215 & n. 1. Instead,

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[1] The parties later stipulated to the joinder of Sage and Not Afraid as additional defendants.

[2] As we noted in *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 981 (9th Cir.1983), a court may take jurisdiction under 28 U.S.C. § 1331 if it must make a determination of law in order to determine whether plaintiff has stated a federal claim.

the court ruled that the allegation that a tribal court had improperly exercised its jurisdiction stated a federal common law claim, because "[t]he necessity of a proper forum wherein the extent of tribal court jurisdiction can be determined can hardly be overemphasized." *Id.* at 215. Proceeding to the merits of National's claim, the court held that the Crow Tribal Court lacked subject matter jurisdiction over Sage's suit and, therefore, entered a permanent injunction.[3]

In *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 981-82 (9th Cir. 1983), decided after the district court's decision in this case, we held that a complaint challenging a tribal court's assertion of jurisdiction over a non-Indian defendant in a civil suit

[3] The district court's analysis of subject matter jurisdiction assumed that the tribe's adjudicatory authority must be coextensive with its regulatory authority. Although our disposition of the case makes it unnecessary to reach the merits of National's jurisdictional argument, we find this assumption untenable. Cases are commonly adjudicated in forums that would lack the authority to regulate the subject matter of the disputes. *See generally Allstate Insurance Company v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981). In analyzing whether a dispute may be decided in a particular state or federal court, we have inquired only whether the court's exercise of jurisdiction is authorized by applicable forum law and whether it comports with due process. *See, e.g., Keeton v. Hustler Magazine*, ___ U.S. ___, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984). The jurisdictional question is not controlled by whether it would be appropriate to apply the forum's substantive law to the dispute. *See Shaffer v. Heitner*, 433 U.S. 186, 215, 97 S.Ct. 2569, 2585, 53 L.Ed.2d 683 (1977). The tribal character of a challenged forum does not alter the essential nature of this inquiry. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 1680, 56 L.Ed.2d 106 (1978).

stated no federal claim for relief. We conclude that *R.J. Williams* controls this case. Accordingly we reverse.

DISCUSSION

National's complaint, as amended, alleges that the tribal court's exercise of jurisdiction over its insured deprived it of due process and equal protection. Indian Tribes are not constrained by the provisions of the fourteenth amendment. *See R.J. Williams*, 719 F.2d at 982; *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). National's due process and equal protection claims cannot, therefore, arise under the Constitution. *R.J. Williams*, 719 F.2d at 981. Tribes are, however, bound by the provisions of the ICRA. *Id.* The ICRA requires tribal courts to exercise their jurisdiction in a manner consistent with due process and equal protection. 25 U.S.C. § 1302(8). Congress has expressly limited federal court review of a claimed violation of the ICRA to encompass a single remedy: the writ of habeas corpus. 25 U.S.C. § 1303. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66-70, 98 S.Ct. 1670, 1681-1683, 56 L.Ed.2d 106 (1977); *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 278 (9th Cir. 1981). A civil suit to enjoin violations of the ICRA is not cognizable in federal court. *Santa Clara Pueblo*, 436 U.S. at 67-70, 98 S.Ct. at 1681-1683; *accord R.J. Williams*, 719 F.2d at 981. Neither the constitution nor the ICRA provides a basis for a federal cause of action.

National urges us, however, to recognize a cause of action arising under federal common law that would permit a civil suit to enjoin the proceedings of a tribal court. National's argument has superficial appeal. It invokes authority holding that a complaint challenging tribal abuse of its civil *regulatory* jurisdiction states a claim arising under federal common law. *See, e.g., Babbitt*

Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 591 (9th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Gardin* [sic] *v. De La Cruz*, 671 F.2d 363, 365, *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). The Supreme Court relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). The question whether a tribe has abused its adjudicatory jurisdiction seems, at first glance, to be as appropriate as a question involving tribal regulatory jurisdiction for resolution in a suit brought in federal court.

Oliphant v. Suquamish Indian Tribe, however, came to the federal courts by way of a petition for habeas corpus. *See* 435 U.S. at 194, 98 S.Ct. at 1013. Congress, when it enacted the ICRA, purposefully restricted federal court interference with the proceedings of tribal courts to review on petitions for habeas corpus. *See Santa Clara Pueblo*, 436 U.S. at 67-70, 98 S.Ct. at 1681-1683. In asking that we recognize a civil cause of action arising under federal common law, National is requesting that we supplement a remedy Congress intended to be exclusive, and that we do so without statutory authority.

National's arguments for a common law cause of action are also not advanced by *Montana v. United States*. 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). *Montana* arose as a declaratory judgment action brought by the United States in its trusteeship capacity. 450 U.S. at 549, 101 S.Ct. at 1250. The district court had jurisdiction of the suit under 28 U.S.C. § 1345 (1976). Moreover, *Montana* involved limitations of an Indian tribe's regulatory jurisdiction. 450 U.S. at 557-67, 101 S.Ct. at 1254-59. As noted above, a tribe's abuse of regulatory jurisdiction

may create a federal cause of action. A tribe's assumption of adjudicatory jurisdiction, however, does not.

The judicial recognition of a cause of action arising under federal common law is an unusual course, to be approached cautiously. *Milwaukee v. Illinois*, 451 U.S. 304, 312-14, 101 S.Ct. 1784, 1789-91, 68 L.Ed.2d 114 (1981). In view of Congress's manifest purpose to limit the intrusion of federal courts upon tribal adjudication, *see Santa Clara Pueblo*, 436 U.S. at 67-70, 98 S.Ct. at 1681-1683, we decline to recognize a common law cause of action in addition to the limited remedies available under the ICRA. We conclude that National may not assert its claim as one arising under common law. National's complaint must be dismissed for failure to state a claim for federal relief.[4]

The district court was rightly concerned that there must be a "proper forum wherein the extent of tribal court jurisdiction can be determined. . . ." 560 F.Supp. at 215. However, the proper forum for this determination, at least in the first instance,[5] is not a federal court but a tribal court. *See Santa Clara Pueblo*, 436 U.S. at 65, 98 S.Ct. at 1680; *R.J. Williams*, 719 F.2d at 983.

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[4] Because we conclude that National's complaint must be dismissed for failure to state a federal claim, we need not reach the other issues raised by the parties. We intimate no views on questions involving sovereign immunity, exhaustion of tribal remedies, state court jurisdiction over Sage's negligence suit or the merits of National's jurisdictional challenge.

[5] Should Sage seek to enforce his default judgment in the courts of Montana, National may, of course, challenge the tribal court's jurisdiction in the collateral proceedings. *See generally Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).

REVERSED.

EUGENE A. WRIGHT, Circuit Judge, dissenting in part and concurring in the result:

I agree that we must reverse but dissent from the holding that we lack subject matter jurisdiction. Instead, I would hold that the plaintiffs stated a federal common law cause of action, but would dismiss because they failed to exhaust tribal remedies.

I.

The court holds today that, while a plaintiff may state a federal common law cause of action for tribal abuse of its *regulatory* jurisdiction, it may not state a cause of action for abuse of its *adjudicatory* jurisdiction. This distinction lacks foundation in law or policy.

We have held that "the extent to which treaties and federal case law divest [a] tribe of the power to exercise civil jurisdiction over non-Indians" presents a federal question under 28 U.S.C. § 1331 (1982). *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984). *Accord, Cardin* v. *De La Cruz*, 671 F.2d 363, 365 (9th Cir. 1982), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982).

It is clear too that a plaintiff may state a federal cause of action for improper taxation by an Indian tribe. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982); *Snow* v. *Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2655, ___ L.Ed.2d ___ (1984).

The majority distinguishes these cases by noting that they all concerned alleged abuses of tribal regulatory jurisdiction, while our case concerns action by a tribal

court. This distinction cannot be found in the cases and rests upon a strained reading of their facts.

Both *Babbitt Ford* and *Cardin* involved underlying actions in tribal courts against non-Indians. In *Babbitt Ford*, the tribal court held the non-Indian violated a tribal repossession regulation. 710 F.2d at 590-91. In *Cardin*, the tribal court closed a grocery store based on the owner's non-compliance with tribal building, health, and safety regulations. 671 F.2d at 364-65. In each, the tribal court action was the immediate cause of the federal claim.

Admittedly, in each case the tribal court applied a rule of decision supplied by tribal regulations. It is difficult to believe, however, that our jurisdiction should turn on the *source* of the tribal rule.

If the tribal court in *Cardin* had closed the grocery store because it was deemed a public nuisance under tribal common law, the harm to the owner and the implicit question of tribal authority would have been the same. Under the majority's analysis, the closure based on tribal regulations would create a federal question while the closure based on the tribal court's interpretation of common law would not.

The distinction between adjudication and regulation may have some application in this area of law. Adjudicatory jurisdiction is often broader than regulatory jurisdiction, because a forum's authority to adjudicate a controversy does not depend on its authority to regulate the underlying subject matter. *See supra*, at 1316 n. 3, *and cases cited therein*. But this distinction goes to the merits. It involves the propriety of the tribal court's assertion of jurisdiction. It does not affect the existence of a federal question.

The majority suggests that recognizing a cause of action for abuse of tribal court jurisdiction would conflict with *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). There, the Supreme Court held that habeas corpus provides the sole federal remedy for alleged violations of the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341 (1982). 436 U.S. at 70, 98 S.Ct. at 1683.

As noted above, however, *Santa Clara Pueblo* has not prevented us from finding that a federal *common law* cause of action exists for abuse of tribal jurisdiction. *Babbitt Ford*, 710 F.2d at 591; *Cardin*, 671 F.2d at 365. Neither *Santa Clara Pueblo* nor the ICRA provide a basis for distinguishing between regulatory and adjudicatory actions by tribes.

The ICRA applies broadly to tribal "powers of self-government" which include "all governmental powers possessed by an Indian tribe, executive, legislative and judicial, and all offices, bodies, and tribunals by and through which they are executed." 25 U.S.C. §§ 1301(2), 1302. *Santa Clara Pueblo* did not distinguish between regulatory and judicial actions. In fact, the underlying dispute involved a tribal regulation. 436 U.S. at 51, 98 S.Ct. at 1673. A federal common law cause of action for abuse of tribal jurisdiction would be no more intrusive here than in *Babbitt Ford*, *Snow*, or *Cardin*.

Although I question the majority's distinction between regulation and adjudication, I would join its opinion if I agreed that it was compelled by *R.J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *petition for cert. filed*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (U.S. April 27, 1984).

R.J. Williams involved a claim for damages by a contractor against a tribal housing authority which had

obtained a tribal court writ seizing the contractor's property. The suit alleged jurisdiction based on diversity, the United States Constitution, the ICRA, and 42 U.S.C. § 1983. It did not allege general federal question jurisdiction under federal common law, as in *Babbitt Ford* and *Cardin*. We held that the plaintiffs failed to allege a proper basis for federal court jurisdiction. *Id.* at 985.

General federal question jurisdiction might have been proper in *R.J. Williams*, at least for the portions of the complaint which sought non-monetary relief. But the plaintiff's failure to allege or argue this basis for our jurisdiction distinguishes *R.J. Williams* from the present case. *See Cardin*, 671 F.2d at 365 n. 2 (distinguishing *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980), because the plaintiff there had not alleged general federal question jurisdiction).

I conclude that plaintiffs have stated a substantial federal question. Subject matter jurisdiction over their claim was proper under 28 U.S.C. § 1331.

II.

My difference with the majority does not stem from any fundamental conflict over the policies at stake. Tribal courts are appropriate forums for the resolution of many disputes involving both Indians and non-Indians. *Santa Clara Pueblo*, 436 U.S. 65, 98 S.Ct. 1680. Federal courts must be hesitant to intervene in their proceedings, both as a matter of comity and to further the federal policy of protecting and strengthening tribal institutions. *Janis* v. *Wilson*, 521 F.2d 724, 727 (8th Cir. 1975), *See Santa Clara Pueblo*, 436 U.S. at 62-64, 98 S.Ct. at 1679-1680.

I agree with the majority that the "proper forum for [determining the scope of tribal court jurisdiction], at least in the first instance, is not a federal court but a tribal

court." *See supra,* at 1323. The plaintiffs never afforded the tribal court the opportunity to rule on their jurisdictional claim. That alone makes federal court intervention at this stage inappropriate.

The majority, however, makes the tribal court the first *and last* arbiter of its own jurisdiction. An assertion of tribal court jurisdiction, no matter how far reaching, would not be subject to review in any federal court. If, for instance, a tribal court decided to adjudicate a controversy between a non-Indian plaintiff and a non-Indian defendant involving matters arising outside the reservation, its power would be limited only by the presence of seizable assets within the reservation. *See supra*, at 1324 n. 5 (indicating that tribal court defendants may seek review of tribal jurisdiction in collateral enforcement proceedings).

The interests that counsel non-intervention in tribal proceedings can be accommodated by less drastic means. Specifically, we should require plaintiffs to exhaust their remedies in tribal courts before seeking federal intervention.

There is precedent for this approach. Before the Supreme Court decided that the ICRA did not confer general federal jurisdiction over Indian civil rights actions, *Santa Clara Pueblo,* 436 U.S. at 72, 98 S.Ct. at 1684, we imposed an exhaustion requirement on plaintiffs seeking to bring those claims. *See, e.g., Howlett* v. *Salish & Kootenai Tribes of the Flathead Reservation,* 529 F.2d 233, 239 (9th Cir. 1976); *St. Marks* v. *Chippewa-Cree Tribe of Rocky Boy Reservation,* 545 F.2d 1188 (9th Cir. 1976). *Accord, McCurdy* v. *Steele,* 506 F.2d 653, 656-57 (10th Cir. 1974); *O'Neal* v. *Cheyenne River Sioux Tribe,* 482 F.2d 1140 (8th Cir. 1973).

The exhaustion requirement stated in these cases is not inflexible. *St. Marks,* 545 F.2d at 1189. To determine

whether exhaustion is appropriate in a given case, we must first determine whether (1) meaningful tribal remedies exist, and (2) exhaustion will serve the purposes of comity and strengthening tribal institutions. Finally, the court must balance the need to preserve and strengthen tribal institutions against any immediate need that would exist to adjudicate the plaintiff's alleged federal rights. *Id.*

Applying that test here, it seems that meaningful tribal remedies exist. The Crow Tribal Code would allow the plaintiffs to challenge the tribal court's jurisdiction. Crow Rules of Civil Procedure, Rules 7(a) (permitting challenge to lack of personal or subject matter jurisdiction), 17 (permitting motion to set aside default judgment).

Second, requiring exhaustion here would strengthen the tribal court system. The plaintiffs ignored that system and instead attempted to circumvent it by suing immediately in federal court. Such disrespect for tribal institutions should be discouraged.

Finally, our interest in respecting and upholding the authority of the tribal court to determine, in the first instance, its own jurisdictional bounds exceeds any immediate need for federal court jurisdiction asserted by the plaintiffs. These factors indicate that the district court should have required the plaintiffs to exhaust their tribal remedies.

III.

The majority and I reach the same result by significantly different paths. I fear, however, that the majority's jurisdictional approach will haunt us in other cases, by creating unworkable distinctions and by barring relief in cases where it is necessary and appropriate. In contrast, the exhaustion approach is flexible and closely tailored to the interests at stake.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. CV 82-230-BLG

NATIONAL FARMERS UNION
INSURANCE COMPANIES, a Utah corporation,
and Lodge Grass School District No. 27,
Plaintiffs,

v.

CROW TRIBE OF INDIANS OF MONTANA, the Crow Indian Tribal Council, the Tribal Court of the Crow Indian Reservation, Eddie Roundface, Glen Birdinground, Ira Left Hand, Judges of the Tribal Court of the Crow Indian Reservation, Donald Stewart, Chairman of the Crow Indian Tribal Council, and Leroy Sage, a minor, by Flora Not Afraid, his guardian, Defendants.
Defendants.

United States District Court,
D. Montana,
Billings Division.

Jan. 26, 1983

School district and its insurer sought preliminary injunction preventing injured schoolboy from executing on the default judgment taken in Indian tribal court against school district. The District Court, Battin, Chief Judge, held that: (1) Indian tribal court lacked jurisdiction over tort claim between injured Indian schoolboy and school district for injuries sustained on school property located within exterior boundaries of reservation but owned by state; (2) state court of Montana had jurisdiction over

controversy; and (3) school district and its insurer were entitled to injunction preventing enforcement of default judgment.

Ordered accordingly.

Rodney T. Hartman, Herndon, Harper & Munro, Billings, Mont., and James Seykora, Hardin, Mont., for plaintiffs.

Francis Lamebull, Harlem, Mont., Thomas R. Acevedo, Fredericks & Pelcyger, Boulder, Colo., for Crow Tribe defendants.

Clarence T. Belue, Hardin, Mont., for defendant Leroy Sage, a minor, by Flora Not Afraid, his guardian.

MEMORANDUM OPINION

BATTIN, Chief Judge.

This matter is before the Court on plaintiff's application for preliminary injunction and motions to dismiss by the defendants. For the reasons discussed below, this Court has determined that the Crow Tribal Court did not have subject matter jurisdiction over the civil suit that formed the basis for the Crow Tribal Court action that is sought to be enjoined. Because the opinion of the Court is dispositive of the instant case as it concerns this Court, a permanent injunction will issue.

FACTS

On May 27, 1982, Leroy Sage, an enrolled Indian of the Crow Tribe and a minor, was struck by a motorcycle in the Lodge Grass Elementary School parking lot while returning from a school-sponsored activity. The land on which the Lodge Grass School is located, although within the exterior boundaries of the Crow Reservation, is owned by the State, with a mineral reservation held by the Tribe. *Crow Allotment Act of 1920* § 16. Leroy Sage

suffered a broken leg for which medical bills, presently incurred and estimated future expenses, total $3000. Through his guardian Flora Not Afraid and attorneys, Leroy Sage brought suit against Lodge Grass School District No. 27 in Crow Tribal Court requesting $153,000 in damages ($150,000 pain and suffering, $3000 actual and future medical expenses).

Process was served by Dexter Falls Down on Wesley Falls Down, School Board Chairman for Lodge Grass School District No. 27. For some reason, Wesley Falls Down failed to notify anyone that a suit had been brought for the injuries to Leroy Sage. The principal, secretary and superintendent of the Lodge Grass Elementary School and directors of the Lodge Grass School District No. 27 (excluding, presumably, Mr. Falls Down) had no knowledge of the suit. Because no one notified National Farmers Union Insurance Companies [National Farmers], the insurance carrier, no preparation to investigate or defend the claim was made.

According to documents filed with this Court, service of summons and complaint was made by Dexter Falls Down on Wesley Falls Down on September 28, 1982. A default judgment was taken on October 19, 1982, twenty-one days after service was made on Wesley Falls Down. A copy of the default judgment was hand delivered by Wesley Falls Down to the principal of Lodge Grass Elementary School in late October. The insurer of the Lodge Grass School District No. 27, plaintiff in this action, was unaware of the claim and judgment until its local adjuster received from the school principal a copy of the $153,000 judgment on October 29, 1982.

PROCEDURE

On November 3, 1982, plaintiff received a temporary restraining order from this Court retraining Leroy Sage

from executing on the default judgment taken October 19, 1982 in Crow Tribal Court. The temporary restraining order expired on November 13, 1982, and was not renewed. A hearing on defendants' motion to dismiss and plaintiffs' request for a preliminary injunction was held on December 14, 1982. On December 29, 1982, this Court issued an order granting plaintiffs a permanent injunction against any execution of the Tribal Court judgment. The rationale for the injunction was that the Crow Tribal Court lacked subject matter jurisdiction over the tort that was the basis of the default judgment.

FEDERAL COURT JURISDICTION

The Crow Tribal Court [Tribal Court] cannot extend its jurisdiction beyond its legal limits. This Federal District Court has the jurisdictional power under 28 U.S.C. § 1331 to determine whether the Tribal Court has exceeded the lawful limits of its jurisdiction. Section 1331 gives district courts jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." The jurisdictional question raised by plaintiff's verified complaint, paragraph No. 14, places at issue the extent of tribal court civil jurisdiction over non-Indians as developed by the Supreme Court in *Montana* v. *United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)—developments that are not drawn from any specific statute or treaty, but raise the overriding federal interest in determining the extent of tribal sovereignty and therefore form a part of federal common law. That federal question jurisdiction under 28 U.S.C. § 1331 can be based on federal common law is well settled. *See, Illinois* v. *City of Milwaukee, Wisconsin*, 406 U.S. 91, 99-100, 92 S.Ct. 1385, 1390-91, 31 L.Ed.2d 712 (1972).

This Court's adquisition of jurisdiction by way of federal common law to examine the correctness of a tribal

court's exercise of civil jurisdiction, is not a novel one. *Cardin* v. *DeLaCruz*, 671 F.2d 363 (9th Cir.1982) (Cardin); *Swift Transportation, Inc.* v. *John*, 546 F.Supp. 1185 (D.Ariz.1982) (Swift); *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 519 F.Supp. 418 (D.Ariz. 1981). The necessity of a proper forum wherein the extent of tribal court jurisdiction can be determined can hardly be overemphasized.

Plaintiff initially claimed that the manner in which notice was given or not given in the tort claim on which default was taken, was a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (ICRA). This Court may be without jurisdiction to determine if the ICRA was complied with by the Tribal Court. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir.1980); *R. J. Williams Co.* v. *Fort Belknap Housing Authority*, 509 F.Supp. 933 (D.Mont.1981). *But see, Dry Creek Lodge, Inc.* v. *Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir.1980). Because the Court finds that the Tribal Court did not have jurisdiction over the tort claim between Leroy Sage and the School district, there is no need to examine this Court's jurisdiction to determine if the ICRA was complied with by the Tribal Court.[1]

TRIBAL COURT JURISDICTION

An analysis of Tribal Court jurisdiction must begin with the nature of the parties and the location of the

[1] The Court leaves the tollowing issue for resolution at a later date: Does a violation of the Constitutional right to due process claimed by a non-Indian, arising out of an event occurring on non-Indian land within the boundaries of an Indian Reservation, state a claim for relief that may be litigated in federal court?

incident. There is no dispute that Lodge Grass School District No. 27 is a non-Indian; indeed, the School District is a subdivision of the sovereign government of the State of Montana. There is no dispute that the alleged tort occurred on school grounds, and that the school grounds are non-Indian land. *Crow Allotment Act of 1920*, § 16, printed in Kappler, *Indian Affairs: Laws and Treaties*, Vol. IV, p. 277 (1928).[2]

Does the Crow Tribal Court have subject matter jurisdiction over the tort claim of Leroy Sage against Montana School District of Lodge Grass No. 27? Here the Tribe seeks jurisdiction over a non-Indian, for events on non-Indian land, although within Reservation boundaries. If the Tribal Court is to have jurisdiction over the tort claim then it has jurisdiction because either: 1) the power has been delegated to the Tribe by Congress through statute, or by the President with advice and

[2] "That there is hereby granted to the State of Montana for common-school purposes sections 16 and 36 within the territory described herein, or such parts of said sections as may be non-mineral or nontimbered, and for which the said State has not heretofore received indemnity lands under existing laws; and in case either of said sections or parts thereof is lost to the State by reason of allotment or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral, nontimbered lands within said reservation, not exceeding 2 sections in any one township. The United States shall pay the Indians for the lands so granted $5 per acre, and sufficient money is hereby appropriated out of the Treasury of the United States not otherwise appropriated to pay for said school lands granted to the said State: *Provided*, that the mineral rights in said school lands are hereby reserved for the benefit of the Crow Tribe of Indians as herein authorized: *Provided further*, that the Crow Indian children shall be permitted to attend the public schools of said State on the same condition as the children of white citizens of said State."

consent of the Senate through a treaty, or 2) the power has been retained by the Tribe as an element of inherent sovereignty even after the Tribal nation became a quasi-sovereign within the exterior boundaries of the United States.

A thorough search of the relevant literature has failed to reveal any congressional legislation or treaties delegating civil jurisdiction over non-Indians to the Crow Tribe. The Tribal Court extended its jurisdiction to the tort on the basis of the Crow Tribal Code [CTC], § 3-2-205, which states: "The Crow Tribal Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation. . . ." It is apparent that the breadth of this jurisdictional granting statute is, at least, limited by decisions of the United States Supreme Court. While the Tribe may point to CTC § 3-2-205 as a jurisdictional grant, there is no statutory grant from the United States Congress or treaty that gives the Crow Tribe power to give itself such a broad jurisdictional grant.

The remaining basis on which the Tribe could assert jurisdiction—retained power of inherent sovereignty—was recently dealt with by the United States Supreme Court in *Montana* v. *United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (*Montana*). *Montana* established "that the dependent status of Indian Tribes has implicitly divested the tribes of the power to regulate, *in general*, 'the conduct of non-Indians on land no longer owned by, or held in interest for the tribes.' " *Cardin* at 366 (emphasis in original) (citation omitted).

The general rule, as stated in *Montana*, in favor of a lack of Tribal jurisdiction over the non-Indian defendant when the contested circumstances occurred on land no

longer owned by or held in trust for the Tribe was qualified by Justice Stewart in *Montana:*

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the reservations, even [though] on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, at 565-66, 101 S.Ct. at 1258 (citations omitted).[3]

Next, it must be determined if the factual circumstances of the alleged tort are within either of *Montana's* narrow exceptions allowing Tribal jurisdiction over non-Indians. Is the dispute between the school district and the injured schoolboy one that questions the Tribe's ability to regulate, through taxation or licensing, the activity of the non-Indian school district? No, the dispute does not involve a contract, lease or other consensual commercial arrangement; instead, a personal injury is the center of the dispute. Hence, there is no Tribal jurisdiction over

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[3] It is worth noting that the dissenting opinion in *Montana*, joined by two Justices, dissents from the opinion of the Court only with respect to its holding that treaty provisions did not retain ownership of the bed of the Big Horn River in the Crow Tribe. *Montana* at 569, 101 S.Ct. at 1259. The dissenters apparently agree with the analysis of the majority, as applied in the instant case by the Court, holding that inherent sovereignty without a treaty or congressional approval is insufficient to give tribal court jurisdiction over civil disputes involving non-Indians for events on non-Indian land.

the alleged tort based on any "consensual relationship" between the Tribe and the school district and, therefore, the first exception to the general rule does not apply.

The second exception to the general rule in *Montana* that may allow Tribal court jurisdiction over non-Indians, speaks to non-contract claims. A Tribe may retain civil jurisdiction over the conduct of non-Indians on fee lands within the reservation when the conduct in question threatens or has some direct effect on the political integrity, the economic security, or the health or welfare *of the Tribe*. *Montana*, at 566, 101 S.Ct. at 1258-59. Emphasis is properly placed on the final phrase of the test: "of the tribe." A personal injury obviously affects the health and welfare of the injured individual, but an individual is not a Tribe. It cannot be reasonably argued that the injuries to Leroy Sage affect the health and welfare of the Crow Tribe. Therefore, neither prong of the exceptions to the general rule in *Montana* analysis is satisfied and it must be concluded that the Tribal court is without jurisdiction to pass judgment on the alleged tort.

This Court's focus on the lack of effect of the tort claim on the Crow Tribe, *qua* tribe, has substantial case law support as the following quotation from *Swift* reveals:

> The Court of course understands that an automobile accident [involved in Swift] can have a "direct effect on . . . the economic security, or the health or welfare "of the individuals involved." Under this second portion of the test, however, the focus is on the interests of the Tribe rather than the interests of the individual members of the Tribe. This distinction is reflected in the cases cited in *Montana*, as well as subsequent cases applying this aspect of the test. *Cardin, supra*, 519 F.Supp. 418 (tribe's interest in enforcing building, health and safety regulations); *Knight* v. *Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (tribe's interest in enforcing zoning ordinance); *Babbitt Ford, supra*, 519 F.Supp. 418 (tribe's interest in enforcing repossession statute). Limiting Tribal Court jurisdiction over non-Indians to cases involving a direct effect on the Tribe itself is also consistent with *Montana's* "general proposition" that Tribal powers do not extend to non-members. *Swift* at 1193.

Tribal interests are not threatened by eliminating tribal jurisdiction to try a single tort. The Tribe may respond that an abundance of torts considered collectively and not individually, may, in some way, threaten Tribal sovereignty. But this argument of aggregation must fail because it destroys the distinction made by the Supreme Court between matters that do affect the welfare of the Tribe, and those matters that do not. If such aggregates were considered to confer Tribal Court jurisdiction and the aggregate but not the individual event was sufficient to grant Tribal jurisdiction, then the distinction between individual controversies that do and do not warrant Tribal jurisdiction disappears. The distinction disappears because, presumably, all individual circumstances insufficient in themselves to confer Tribal Court jurisdiction could be hypothetically aggregated to yield an effect sufficient for the Tribe to invoke jurisdiction. This Court cannot consider an argument that so directly contradicts the holding in *Montana*; we can consider only the effect of the single tort on the Tribe as a whole and not a hypothetical aggregation.

As those familiar with Indian law are aware, the law changes rapidly in this area. An old case is old law. The Tribe points to *Williams* v. *Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) for the proposition that the Tribe has jurisdiction over civil claims against non-Indians. In this Court's opinion, the concern of *Williams*—that the exercise of state court jurisdiction would infringe on the right of reservation Indians to make

their own laws and be ruled by them—does not exist here. Further, the *Montana* analysis specifically addresses the civil jurisdiction of a Tribe over non-Indians, while *Williams* held that it was "immaterial that respondent is not an Indian." *Williams*, at 223, 79 S.Ct. at 272.

The above analysis of Tribal court jurisdiction shows that civil jurisdiction over torts committed by non-Indians is not necessary to protect Tribal self-government, economic security or the health and welfare of the Tribe and, hence, cannot survive without express Congressional approval. Congress has not delegated that power to the Tribe. Therefore, when the Tribe extended its civil jurisdiction to include the suit between Leroy Sage and the Lodge Grass School District, the Tribe was asserting a power it did not have. *See, UNC Resources, Inc.* v. *Benally*, 518 F.Supp. 1046 (Ariz.1981).

STATE COURT JURISDICTION

If the Tribal Court does not have jurisdiction over the claim of Leroy Sage against the School District, is Sage without a court of competent jurisdiction to hear his claim? No, the state courts of Montana are the proper courts for his claim against the School District. It is inconceivable that the United States Supreme Court in *Montana* would obligate this Court to apply a jurisdictional test that would allow a wrong to occur without a forum to redress that wrong.

Because the tort claim does not present grounds for federal jurisdiction, the tort belongs in state court. "[A]n Indian has the same rights as are accorded to any other person to invoke the jurisdiction of state courts to protect his legal rights in matters not affecting either the federal government or tribal relations. . . . The propriety of suits by Indians against non-Indians in state courts has been recognized and approved by the Supreme Court of

the United States [in] *Williams* v. *Lee*, 358 U.S. 217 [79 S.Ct. 269, 3 L.E.d.2d 251] (1959)." *Paiz* v. *Hughes*, 76 N.M. 562, 417 P.2d 51, 52 (N.M.1966) (citations omitted).

The state district court of Montana should not be reluctant to take jurisdiction over this tort claim simply because there is an Indian plaintiff. "Enrolled members of Indian tribes within Montana are citizens of the United States and citizens of Montana. An Indian is entitled, as any other citizen to bring an action in the courts of this state." *Bad Horse* v. *Bad Horse*, 163 Mont. 445, 449, 517 P.2d 893, *cert. denied*, 419 U.S. 847, 95 S.Ct. 83, 42 L.E.d.2d 76 (1974). *See also, Woodtick* v. *Crosby*, 169 Mont. 38, 544 P.2d 812 (1976); *McCrea* v. *Busch*, 164 Mont. 442, 524 P.2d 781 (1974); *Iron Bear* v. *District Court*, 162 Mont. 335, 512 P.2d 1292 (1973).

REMEDY

This Court will issue a preliminary injunction to prevent execution of the Tribal Court default judgment if the test set out by the Ninth Circuit Court in *William Inglis & Sons Baking Company* v. *ITT Continental Baking Company*, 526 F.2d 86 (9th Cir.1975), has been met. The test requires that the party seeking the injunction show either probable success on the merits of the controversy and the possibility of irreparable injury, *or* that serious questions are raised and the balance of hardships is tipped sharply in favor of the party seeking the injunction. *Id.* at 88.

As the previous sections of this opinion set forth, the Tribal Court was without jurisdiction in the dispute between Leroy Sage and the School District. The defendant School District and its insurer, National Farmers, face serious harm if the invalid judgment is executed upon, and that harm clearly outweighs any burden an injunction

would impose on Leroy Sage. Without an injunction, the School District is threatened by irreparable harm in that the School District may be forced to pay, without its day in Court, a $153,000 default judgment for the broken leg suffered by Leroy Sage. Without the intervention of this Court, there is no other recourse available to the School District. This opinion establishes the success of the School District based on the claim that the Crow Tribal Court was without jurisdiction; hence a preliminary injunction is proper.

Because this Court finds a lack of Tribal Court jurisdiction, this ruling is therefore dispositive of the matter, and it is appropriate for a permanent injunction to issue. The permanent injunction issued by this Court enjoins Leroy Sage, his guardian Flora Not Afraid, and anyone acting on their behalf from attempting to enforce or execute the default judgment issued by the Crow Tribal Court in its case No. Civil 82-287, or from attempting to enforce any Crow Tribal Court judgment based on the injury suffered by Leory Sage at the Lodge Grass School on or about May 27, 1982.

CONCLUSION

In the words of Felix Cohen, "the extent of Tribal civil jurisdiction over the non-Indian is not fully determined." F. Cohen, *Handbook of Federal Indian Law*, p. 253 (1982 ed.). This Court has followed the analysis suggested by the Supreme Court in *Montana* for determining the extent of tribal civil jurisdiction over a non-Indian, and found that the commission of a tort by a non-Indian on non-Indian land does not sufficiently affect the health and welfare of the Crow Tribe to invoke Tribal jurisdiction. Because Tribal jurisdiction is absent and both parties in

the original tort claim are Montana citizens, the State of Montana can protect its interests and assert jurisdiction over the tort claim.

An appropriate order conforming to this Memorandum Opinion was issued by the Court on December 29, 1982.